IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-203.

MORTON EISEN, on Behalf of Himself and All Other Purchasers and Sellers of "Odd-Lots" on the New York Stock Exchange Similarly Situated,

Petitioner,

v.

CARLISLE & JACQUELIN and DeCOPPET & DOREMUS, Each Limited Partnerships Under New York Partnership Law, Article 8 and NEW YORK STOCK EXCHANGE, an Unincorporated Association,

Respondents.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

This reply brief is filed in response to Respondents' Supplemental Brief, the sole purpose of which is to call the Court's attention to the decision in *Greenfield v. Villager Industries, Inc.*, 17 Fed. Rules Serv. 2d 577 (3d Cir. 1973), reh. den. and reh. *en banc* den. (July 27, 1973).[1] Respond-

1. Respondents ostensibly rely on Rule 24(5) which permits a supplemental brief "at any time while a petition for a writ of certiorari is pending calling attention to new cases . . . not available at the time of his last filing." The *Greenfield* decision was reported in the July 11, 1973 issue of the CCH Federal Securities Law Reporter, seven weeks before Respondents' Brief in Opposition to the Petition was filed.

ents have printed a copy of the decision in the appendix to their Supplemental Brief, but failed to include the opinion of Judge Adams dissenting from the denial of rehearing. A copy of Judge Adams' opinion is printed in the appendix hereto. It supports Petitioner's submission here as follows:

> "More important though, at least for me, is the implication of the panel decision regarding notices in the future insofar as cases arising from stock transactions are concerned. There is some danger that the opinion may be interpreted to mean that individual notice must always be required in such situations. Yet, whether there should be individual notices or whether notice by publication may be satisfactory should, in the absence of an abuse of discretion, be a matter for the district court. Notice to members of a class can involve many considerations, and the district court has the advantage of being on the scene and aware of all of the countervailing factors. Although a district judge might well have provided for wider publication, or a greater time period for filing claims or for opting out of the class, or even insisted on individual notices, the critical question is whether it is an abuse of discretion when the district judge does not do so. The record would not appear to support a conclusion that the district court here did, in fact, abuse his discretion." (5 psa)

Judge Adams' view accords with that of the Third Circuit in *Katz v. Carte Blanche Corporation,* No. 72-1054 (May 22, 1973) (rehearing pending), printed in the appendix to the Petition for a Writ of Certiorari, at 136a *et seq.* Judge Adams' dissent, coupled with the opinion in

Katz, underscores, as does the conflict within the Second Circuit itself, the need for this Court to resolve the significant issues raised by the *Eisen* petition.

Respectfully submitted,

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PETITIONER'S SUPPLEMENTAL APPENDIX.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 72-1998 and 72-1999

RICHARD D. GREENFIELD and SAMUEL MOSHINSKY, on behalf of themselves and all others similarly situated,

v.

VILLAGER INDUSTRIES, INC., NORMAN RAAB, KRISTINE RAAB, MAX L. RAAB, MARY L. RAAB, ALAN E. SALKE, WILLIAM B. EAGLESON, JR., THOMAS E. FEELEY, HERBERT J. GOODFRIEND, and CLARENCE RAINESS & COMPANY, DUPONT GLORE FORGAN INCORPORATED,
one of the class of plaintiffs above-named,
Appellant in No. 72-1998.

BURNHAM & COMPANY, INC., etc.,
Appellant in No. 72-1999.

SUR PETITION FOR REHEARING.

Present: SEITZ, *Chief Judge,* and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER and WEIS, *Circuit Judges.*

The petition for rehearing filed by Plaintiffs-Appellees in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the

decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
ALDISERT,
Circuit Judge.

Dated: July 27, 1973.
JUDGE ADAMS dissents.

ADAMS, *Circuit Judge,* Dissenting Sur Denial of Petition for Rehearing.

I respectfully dissent from the order denying rehearing in this case, because I believe that the petition presents a serious question regarding "notice" in connection with proposed settlements of class actions. Also, it addresses important problems relating to standing and the nature of relief when notice is deemed by an appellate court to be inadequate.

The settlement here was reached by the named plaintiffs and Villager. It provided that 660,000 shares of Villager stock was to be made available for distribution to those who had purchased Villager stock in 1968 and 1969, the period during which fraudulent statements regarding the company were allegedly made.

Plaintiffs had sought to have the matter declared a class action under Rule 23(c) on November 13, 1970, an early stage of the litigation, but the district court deferred making the necessary determination. When the proposed settlement developed, the plaintiffs again requested the district court to declare the matter a class action. Although in their petition for class determination plaintiffs had offered to send individual notices, predicated on an

appropriate list being prepared and submitted by Villager, the district court entered an order on June 7, 1972, providing that notice by publication would be sufficient under Rule 23(c)(2). Also, the class was to consist of "purchasers" during 1968 and 1969. Publication appeared on June 23 and June 30, 1972, in both the Philadelphia Evening Bulletin and Wall Street Journal. It provided for a cut-off date of August 1st for the filing of all claims or the filing of an election to be excluded from the class, or for filing objection to the settlement; and for a hearing on August 31, 1972, to determine whether the settlement was fair and reasonable and should be approved. The August 1st deadline was later extended to August 23, 1972.

On August 31, 1972, Burnham & Co. and duPont Glore Forgan, two large and widely-known brokerage firms, presented a rule to adjourn the hearing in order to permit additional time to solicit and file claims on behalf of individual customers of these firms who may have purchased Villager stock during 1968 and 1969, but kept such stock in street name. Specifically, Burnham and duPont sought extensions of time until the end of September, 1972, to file claims on behalf of their customers. At the hearing it was made clear that duPont and Burnham had learned of the proposed class settlement by the latter part of July. No explanation was given by them as to why they did not request an extension, *at that time,* before the deadline fixed by the court. They did explain that it would take a number of weeks to ascertain the names of their customers who may have bought Villager stock in 1968 and 1969. An affidavit filed by Burnham on August 31, 1972, stated that "because of an error in a computer run and because of the number of customers and transactions involved" it had taken several weeks to obtain the information. DuPont did not file an affidavit, but at the hearing on August 31,

1972, its counsel stated that there had been a delay caused because of recent mergers and the fact the material was in a warehouse.

Claims representing 11,000,000 shares of Villager stock had apparently been filed by the deadline. Also, customers of Burnham had sent in a substantial number of verified claims within the time designated by the district judge.

There was no suggestion at the hearing before the district court that the settlement had been influenced by fraud or collusion, that it was not fair, or that it was unreasonable. Indeed, on August 31, 1972, the day the district judge approved the settlement in open court, counsel for duPont and Burnham were present in the courtroom and did not object to the settlement.

The notices of appeal filed by Burnham and duPont indicate that these companies were appealing primarily from the failure of the district court to extend the period of time for filing claims for their customers, or opting out of the settlement.

After the appeals were filed, Burnham and duPont sought a stay of the distribution of the Villager stock. This was denied by the district court on October 4, 1972. Burnham and duPont did not apply to this Court for a stay of the distribution.

Under the circumstances, there would seem to be considerable question whether Burnham and duPont have standing to assert claims regarding the nature of the notice of the class action settlement or regarding the order of the trial judge in refusing to grant additional time for filing notice of claims or for opting out. The real injury caused by the nature of the notice or the failure to extend the time, is suffered by their customers. And in any event, Burnham and duPont would not appear to have standing

to complain on this appeal about the nature of the notice since the specific complaint pressed by them before the district court was not addressed to the nature of the notice (publication rather than individual notification) but to the district court's refusal to extend the time.

More important though, at least for me, is the implication of the panel decision regarding notices in the future insofar as cases arising from stock transactions are concerned.[1] There is some danger that the opinion may be interpreted to mean that individual notice must always be required in such situations. Yet, whether there should be individual notices or whether notice by publication may be satisfactory should, in the absence of an abuse of discretion, be a matter for the district court. Notice to members of a class can involve many considerations, and the district court has the advantage of being on the scene and aware of all of the countervailing factors. Although a district judge might well have provided for wider publication, or a greater time period for filing claims or for opting out of the class, or even insisted on individual notices, the critical question is whether it is an abuse of discretion when the district judge does not do so. The record would not appear to support a conclusion that the district court here did, in fact, abuse his discretion.[2]

Finally, I am troubled by the sweep of this Court's judgment, which vacates the entire settlement, even though no party has requested such drastic action, or even objected to the settlement as such. Restructuring a settlement in-

1. *See* Eisen v. Carlisle & Jacquelin, No. 72-1521 (2d Cir. filed May 1, 1973), *rehearing denied*, May 24, 1973.

2. Since, at the hearing on August 31, 1972, Burnham and duPont requested only an extension of time to file claims or elections, and did not at that time ask for a new notice procedure to include individual notices, the charge of abuse of discretion by the district court should be addressed to the district court's order denying the extension of time.

volving a volatile stock, such as Villager, may be most difficult and even inequitable at this late date. Would it not be more appropriate, assuming it is determined that there are some purchasers of the stock within the two-year period who have not yet asserted claims, to remand this particular problem to the district court, who, after hearing from counsel, might well permit such purchasers to recover on a pro rata or some other equitable basis if they now come forward and establish their claims. It is conceivable, I suppose, that there might be very few such stockholders. To strike down the entire settlement because of the possibility of a few such stockholders may be punitive for individual members of the class who in no way actively participated in formulating the notice or in deciding to proceed with the distribution. The matter might be more susceptible to a solution aimed at the specific problem, whether that problem is considered in terms of an additional 30 days to file claims or the lack of individual notice to purchasers of Villager stock during 1968 and 1969.

The ordering of distribution by the district court before the appeal is somewhat troublesome. However, it may be that such step was taken by the district court on the premise that if there were a reversal on his ruling not to extend the period for filing by Burnham and duPont stockholders for approximately a month, the harm caused by the early distribution could be rectified by specific awards, such as suggested above, or by permitting such purchasers to assert their claims by separate suit. Admittedly, the record is not clear on the distribution point, but a hearing on remand would undoubtedly clarify it.

For the foregoing reasons I believe the petition for rehearing should be granted to permit a full exploration of the problems posed by the appeal.